In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1253

JAMES BAUER TOLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 370 F. 2d 799.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1967. A petition for rehearing was denied on February 15, 1967. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to April 15, 1967, and the petition was filed on April 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

262-681—67

QUESTIONS PRESENTED

1. Whether petitioner's retrial for theft after the jury had acquitted him of burglary and had disagreed as to the theft was barred by principles of *res judicata* or double jeopardy.

2. Whether petitioner's conviction in the District Court of Guam was invalid because the judge of that court is appointed for a term of years rather than for life.

3. Whether petitioner was properly convicted of theft within a federal enclave although he was not physically present in the enclave when the crime was committed.

4. Whether there was prejudicial error in the conduct of the trial.

STATEMENT

After a jury trial in the District Court of Guam, petitioner was convicted, under the Assimilative Crimes Act, 18 U.S.C. 13, of grand theft under the law of Guam and on June 4, 1965, was sentenced to four years' imprisonment. The court of appeals affirmed.

The evidence showed that on a night in July 1964, one Wansor and Mantanona, a co-defendant, drove in petitioner's truck from petitioner's home to the premises of an electrical company located on land owned by the United States (R. 278–279, 233–234).[1] They took a roll of wire lying outside a fence and returned to petitioner's house where they unloaded it (R. 279–280). Wansor then left in the truck to pick up Ward, another co-defendant, and the two men

[1] "R." refers to the transcript of proceedings at trial.

came back to petitioner's house. With Mantanona they immediately set out again in petitioner's truck for the electrical company (R. 280–281). There they forcibly entered a yard through the fence and stole more rolls of wire and a truck belonging to the company (R. 282, 284–285, 306). They drove both trucks back to petitioner's house. Petitioner came out, saw the company truck and remarked that taking it was a "stupid move" (R. 285–286). He helped unload the wire and told the three men to return the stolen truck. Wansor drove it back to the company premises; Mantanona and Ward followed in petitioner's truck. This time the three men entered the company warehouse after breaking the lock on the door (R. 286–287). They took wire, jacks, and a surveyor's transit and then returned to petitioner's house (R. 288–289). Petitioner, after learning that the men had broken into the warehouse, said that doing so was foolish because they risked an additional charge of burglary (R. 290, 307). Petitioner then took charge of selling and disposing of the stolen property.

ARGUMENT

1. Petitioner, Mantanona and Ward had originally been indicted for both burglary and grand theft. At their first trial, the jury acquitted petitioner and Mantanona of burglary, but reached no agreement on the theft charge[2] after twelve hours of deliberation

[2] Ward was acquitted and the charges against him dismissed while the jury was considering its verdict. Contrary to petitioner's assertion (Pet. 8) however, the minutes reveal that the jury was instructed, in the early morning of the final day of deliberations, that it should not consider the evidence as to Ward (R. 23).

(Tr. 22–23). The court at that point discharged the jury. Petitioner and Mantanona were retried on the theft charge.

The fact that petitioner did not consent to the discharge of the jury at the first trial did not bar his retrial on the theft charge. It has long been settled that the principle of double jeopardy does not bar retrial of a defendant whose previous trial ended because of the jury's inability to agree upon a verdict. *United States* v. *Perez*, 9 Wheat. 579. And it was within the permissible discretion of the judge to determine that the jury's inability to reach agreement after twelve hours of deliberation over a period of two days warranted a mistrial. See *Keerl* v. *Montana*, 213 U.S. 135; *United States* v. *Cording*, 290 F. 2d 392 (C.A. 2); *Marienfeld* v. *United States*, 214 F. 2d 632 (C.A. 8), certiorari denied, 348 U.S. 865.

Nor was retrial barred on the principle of *res judicata* (see *Sealfon* v. *United States*, 332 U.S. 575). Acquittal on the burglary charge did not determine, favorably to petitioner, the facts required to convict him of grand theft. The evidence indicating petitioner's disapproval of his confederates' entering of the warehouse may well have persuaded the first jury that petitioner was not a willing participant in the burglary, as opposed to his participation in grand theft as evidenced by his role in selling and disposing of the stolen property. It is clear, however, that the jury at the first trial did not agree that petitioner was uninvolved in the crime of grand theft, since in that event it would also have acquitted him on that count.

2. Guam is declared by statute to be an "unincorporated territory of the United States." 48 U.S.C. 1421a. The judge for the District Court of Guam is appointed by the President, with the advice and consent of the Senate, for a term of eight years. 48 U.S.C. 1424b. Petitioner contends that, because the judge who presided at his trial was not appointed for life, the conviction is invalid. It is beyond doubt, however, that Congress may establish for "unincorporated territories" courts that are not subject to Article III of the Constitution and its provision for life tenure of judges. See *e.g., American Insurance Co.* v. *Canter,* 1 Pet. 511, 546; *Balzac* v. *Porto Rico,* 258 U.S. 298, 312–313. That principle (and its constitutional, historical, and practical foundations) was recently reexamined and approved in *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 544–547. We submit, therefore, that petitioner's conviction is not vitiated because the judge who presided at his trial in Guam did not enjoy life tenure.[3] *Abreu* v. *United States,* 308 F. 2d 248 (C.A. 1), certiorari denied, 372 U.S. 918.

3. Petitioner argues, for the first time in this Court, that he could not be convicted under the Assimilative Crimes Act, 18 U.S.C. 13, because he was never "within or upon" any place within the special maritime or territorial jurisdiction of the United States. However, there can be no question of the power of Congress to punish all who participate in a crime committed

[3] In 1966, judges in Puerto Rico were made subject to life tenure. See P.L. 89–571, 89th Cong., 1st Sess., 80 Stat. 764. Judges in Guam, the Virgin Islands, and American Samoa are appointed for a period of years.

on federal property even though some of the participants are not physically present at the installation. The language used by Congress fairly apprised petitioner that by participating in the theft he was violating the federal statute.

4. Petitioner argues that it was reversible error for the trial judge to release eleven members of the jury for the period of a week in order to summon a new panel from which the twelfth juror could be chosen. No objection was made by petitioner's counsel to this procedure, and, as the court of appeals pointed out (370 F. 2d at 803), petitioner has not shown how he was prejudiced thereby.

Petitioner's contention that the trial judge erred in denying him severance from Mantanona is frivolous. As the court of appeals noted (370 F. 2d at 802), petitioner and Mantanona were alleged to have "participated in the same * * * series of acts or transactions constituting an offense" (Rule 8(b), F.R. Crim. P.). Moreover, as the court below also observed (370 F. 2d at 802–803), petitioner pointed to no incidents at the trial that would have called for his protection under Rule 14, F.R. Crim. P.

Petitioner's objection (Pet. 12–15) to alleged prejudicial misconduct of the prosecutor at the first trial is of no relevance to the present case, which involves petitioner's second trial.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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